

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CRIMINAL PRODUCTIONS, INC.,

Plaintiff,

v.

OLENA WILSON, an individual,

Defendants.

Civil Action No. 17-cv-102RAJ

RESPONSE TO MOTION TO VACATE
DEFAULT

1 Plaintiff respectfully responds to Defendant Olena Wilson's response to motion for default
2 judgment, construed by the Court as a motion to vacate default. (April 9, 2018 Motion Calendar Entry)

3 BACKGROUND

4 Plaintiff brought this action for copyright infringement against a number of Doe defendants
5 identified by Internet Protocol ("IP") addresses. After conducting preliminary discovery with respect to
6 the identities of the subscribers assigned the subject IP addresses, Plaintiff filed its amended complaint
7 naming Defendant. (Dkt. 14) Plaintiff alleges that it owns the rights in the protected motion picture
8 *Criminal*, and that Defendant directly, indirectly or contributorily infringed Plaintiff's copyright.
9 Plaintiff seeks injunctive relief, destruction of unauthorized copies, statutory damages and reasonable
10 attorney's fees and costs. (*Id.*, Prayer for Relief) Proof of service of the amended complaint was filed
11 with the Court. (Dkt. 26) Defendant filed a motion to dismissed that was opposed and ultimately denied.
12 (Dkt. 35) When the Defendant failed to answer or otherwise respond within the time required by law
13 thereafter, Plaintiff moved for default, which was entered. (Dkt. 41) Plaintiff now moves for default
14 judgment and the relief requested.

15 ARGUMENT

16 An entry of default may be set aside for good cause. Fed. R. Civ. P. 55(c). The "good cause"
17 standard for vacating an entry of default is the same standard for vacating a default judgment. *Franchise*
18 *Holdings II, LLC v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925 (9th Cir. 1986) see also Fed. R.
19 Civ. P. 65(b). In deciding whether to set aside an entry of default, the Court considers three factors:
20 (1) whether Plaintiff will be prejudiced if the Court sets aside the default judgment, (2) whether
21 Defendants have a meritorious defense, and (3) whether culpable conduct of Defendants led to the
22 default. *Falk v. Allen*, 739 F.2d 461 (9th Cir. 1984). These factors are to be considered conjunctively. *See*
23 *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001); *Phi Thi Nguyen v. Cty. of*
24 *Clark*, 2010 U.S. Dist. LEXIS 90539, at *7-8 (W.D. Wash. 2010). The decision of whether to set aside
25 a default judgment is discretionary. *TCI*, 244 F.3d at 695.

Plaintiff respectfully submits that good cause is not shown to vacate the entry of default and that default judgment should be entered against Defendant. First, Plaintiff would be prejudiced by vacating default and reopening the case at this last date. To be prejudicial, the setting aside of a judgment must hinder a plaintiff's ability to pursue his or her claim. *TCI*, 244 F.3d at 701. That is, the delay caused to a plaintiff as a result of pursuing the default judgment "must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." *Id.* (quoting *Thompson v. Am. Home Assur. Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996)). Such is the case here. Plaintiff has sought diligently to enforce its claims against Defendant since the case was filed January 25, 2017, but has been denied the opportunity by Defendant's actions. Defendant has been well aware of Plaintiff's claims, and actively participated in the litigation by filing a motion to dismiss instead of answering June 19, 2017. (Dkt. 18) After the Court denied Defendant's on January 8, 2018 (Dkt. 35), Defendant failed to answer as required under FRCP 12(a)(4)(A), and again after Plaintiff provided written notice of its intent to move for entry of default pursuant to LCR 55(a). At this point, after entry of default and Plaintiff's motion for default judgment against Defendant—the last remaining party in this case—Plaintiff respectfully submits that it would be prejudiced if the default was set aside and the case was reopened at this late date, nearly 18 months after the case commenced and with critical evidence stale; for example, the loss of memory of infringing actions, existence of computer hardware and memory, etc. from January 2017).

Second, Defendant have not articulated a meritorious defense. "A defendant seeking to vacate a default judgment must present specific facts that would constitute a defense." *TCI*, 244 F.3d at 700. As set forth in Plaintiff's motion for default judgment (Dkt. 43), Defendant has failed to come forward with anything more than a bald denial of liability in the face of Plaintiff's proof of meeting all required elements for copyright infringement; this does not demonstrate a meritorious defense, or even a factual or legal basis to prove the same. On the other hand, Plaintiff has demonstrated its likelihood of prevailing on the merits. To prevail on a copyright infringement claim requires (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. *Kelly v. Arriba Soft Corp.*, 336 F.3d

1 811, 817 (9th Cir. 2003). The evidence of copyright infringement by Defendant demonstrates that
2 Defendant's conduct was willful and Plaintiff has suffered real harm. In evaluating the merits in this type
3 of situation (default judgment), courts often apply the factors listed in *Eitel v. McCool*, 782 F.2d
4 1470, 1471-72 (9th Cir. 1986). Here, all factors weigh in favor of default judgment. Without entry
5 of default judgment, Plaintiff will be prejudiced because it will be left without a legal remedy. *See*
6 *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 920 (C.D. Cal. 2010). Plaintiff
7 has adequately alleged and shown Defendant's liability. The amount at stake is also relatively
8 modest—Plaintiff seeks damages at the lower end of the statutory range along with modest
9 attorney's fees and costs for efficient work on this case. Defendant's failure to respond is not the
10 product of excusable neglect; they were properly served. Finally, although there is a strong policy
11 for deciding cases on their merits, Defendant's failure to respond to Plaintiff's claims means that
12 this factor does not preclude entry of default judgment. *See Vogel v. Rite Aid Corp.*, 992 F.Supp.2d
13 998, 1013 (C.D. Cal. 2014).

14 Third, the culpable conduct of Defendants led to the default. A defendant's conduct is culpable
15 where there is "no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith
16 failure to respond." *TCI*, 244 F.3d at 698. Here, as noted above, Defendant has been well aware of the
17 case proceedings, and in fact has used the system when it served her to actively oppose Plaintiff's
18 prosecution, including by filing a motion to dismiss. Defendant was well aware of case deadlines, and
19 was specifically notified in writing of Plaintiff's intention to move for default. The only explanation for
20 default is that Defendant deliberately intended not to respond, gambling that the case would just go away
21 after she lost the motion to dismiss. Indeed, Defendant's response is completely devoid of any good faith,
22 credible reason for failing to respond in this case. It was only when Defendant realized that Plaintiff
23 would be seeking reimbursement for its attorney's fees and costs as part of the default judgment that
24 Defendant decided that her gamble failed, prompting the present motion to vacate the judgment. This
25 legal strategy is precisely the type of default behavior lacking good faith that the TCI court found
26 consistent with "a devious, deliberate, willful, or bad faith failure to respond."



1 Plaintiff respectfully requests that the Court deny Defendant's motion to vacate the default, and
2 enter judgment against the defaulted Defendant.

3 RESPECTFULLY SUBMITTED April 23, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served to all counsel or parties of record who are deemed to have consented to electronic service via the Court's CM/ECF system, and by U.S. Mail as follows:

Olena Wilson
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Sammamish, WA 98074

s/ David A. Lowe